No. 95-1621

In the Supreme Court of the United States

OCTOBER TERM, 1996

HARBOR TUG AND BARGE COMPANY, PETITIONER

v.

JOHN PAPAI AND JOANNA PAPAI

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING RESPONDENTS

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QUESTIONS PRESENTED

The Jones Act, 46 U.S.C. App. 688, provides a "seaman" injured in the course of his employment with a negligence cause of action against his employer. The Longshore and Harbor Workers' Compensation Act (LHWCA), 33 U.S.C. 901 *et seq.*, requires employers to pay compensation and medical benefits to certain maritime workers injured in the course of their employment, but excludes from its scope "a master or member of a crew of any vessel," 33 U.S.C. 902(3)(G), a designation that has been held to be synonymous with a "seaman" under the Jones Act. The questions presented are:

1. Whether a determination in a compensation proceeding under the LHWCA that a worker was not a member of a crew precludes the worker from independently establishing his status as a seaman in a civil suit under the Jones Act.

2. Whether an employee who is hired on a daily basis through a multi-employer hiring hall to perform maritime work on a vessel has the requisite connection to an identifiable group of vessels to be considered a seaman subject to Jones Act coverage.

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INTEREST OF THE UNITED STATES

This case presents the question whether a determination by an administrative law judge that an injured worker is covered by the Longshore and Harbor Workers' Compensation Act (LHWCA), 33 U.S.C. 901 *et seq.*, precludes the worker from bringing an action against his employer under the Jones Act, 46 U.S.C. App. 688. The case also presents the question whether an employee who is hired on a daily basis through a multi-employer hiring hall to work on vessels has the requisite connection to an identifiable group of vessels to be considered a seaman subject to Jones Act coverage. The Secretary of Labor administers the LHWCA, 33 U.S.C. 939, and thus has an interest in whether LHWCA adjudications have a preclusive effect on Jones Act proceedings and whether

employees who staff vessels through multi-employer hiring halls are included in Jones Act coverage (and excluded from LHWCA coverage) as "member[s] of a crew." 33 U.S.C. 902(3)(G).

STATEMENT

1. The Jones Act provides that "[a]ny seaman who shall suffer personal injury in the course of his employment may, at his election, maintain an action for damages at law, with the right of trial by jury." 46 U.S.C. App. 688(a). The Act thus provides a worker who is a "seaman" with a negligence cause of action against his employer.

The LHWCA is a workers' compensation statute that applies to certain employees injured in the course of maritime employment "upon the navigable waters of the United States" and adjoining areas. 33 U.S.C. 903(a). Section 2(3)(G) of the LHWCA defines an "employee" covered by the Act as

> any person engaged in maritime employment, including any longshoreman or other person engaged in longshoring operations, and any harborworker including a ship repairman, shipbuilder, and ship-breaker, *but such term does not include* * * * *a master or member of a crew of any vessel.*

33 U.S.C. 902(3)(G) (emphasis added). A "master or member of a crew of any vessel" within the meaning of the LHWCA is synonymous with "seaman" under the Jones Act. See *McDermott Int'l, Inc.* v. *Wilander*, 498 U.S. 337, 347 (1991).

2. Respondent John Papai[1] was injured while working as a deckhand on a tug operated by petitioner

[1] Joanna Papai, John's wife, is also a plaintiff in the action (and a respondent in this Court), seeking damages for loss of consortium, Pet. App. 3a; because her claims are derivative of her husband's, however, we use the term respondent in this brief in the singular to refer to John Papai.

Harbor Tug and Barge Company. Pet. App. 3a. Petitioner does not maintain a permanent crew for its own vessels. Instead, pursuant to a Deckhands Agreement with the Inland Boatman's Union (IBU or Union), it obtains necessary staff for its vessels from the Union's hiring hall. *Ibid.* On the day of his injury, respondent had been dispatched to work as a deckhand on a one-day assignment to the tug, under the supervision of petitioner's port captain. Respondent was assigned to paint the tug and was injured when he fell while climbing down a ladder. *Ibid.* Between 1987 and his injury on March 13, 1989, respondent had obtained maintenance, deckhand, and longshoring jobs through the IBU hiring hall with various participating employers. *Id.* at 36a-37a. Those jobs mostly lasted one day, sometimes two or three days, and occasionally longer. J.A. 29, 34. Between January 1, 1989, and the date of his injury, respondent worked 13 days for petitioner. Pet. App. 3a.

3. In January 1990, respondent filed this action against petitioner seeking damages under the Jones Act and for unseaworthiness under general maritime law. Pet. App. 3a. The district court granted petitioner's motion for summary judgment, ruling that respondent was not a "seaman" within the meaning of the Jones Act or under general maritime law. *Id.* at 23a. The court, however, provided respondent with an opportunity to amend his complaint. *Ibid.* Respondent thereupon filed an amended complaint in the district court under Section 5(b) of the LHWCA, 33 U.S.C. 905(b), seeking damages from petitioner as a

result of its alleged negligence as the owner/operator of the tug. Pet. App. 4a; J.A. 82. In addition, respondent filed a motion seeking reconsideration of the court's ruling on "seaman" status. The district court denied that motion, but certified its summary judgment ruling on the "seaman" issue for interlocutory appeal under 28 U.S.C. 1292(b). Pet. App. 25a. The court of appeals denied respondent's petition for interlocutory appeal in October 1990. *Id.* at 4a.

4. After the district court's summary judgment ruling, respondent filed a claim for benefits under the LHWCA. Pet. App. 4a. The case proceeded to hearing before an administrative law judge (ALJ). *Id.* at 32a; 20 C.F.R. 702.252, 702.331-702.351.[2] Although petitioner had obtained summary judgment in the Jones Act proceeding on the ground that respondent was not a "seaman," it argued at the hearing that respondent "may have been a Jones Act seaman" at the time of his injury, and that, if so, he was excluded from the LHWCA as a "member of a crew of [a] vessel," 33 U.S.C. 902(3)(G). Pet. App. 34a-35a; see 20 C.F.R. 702.251.

In considering whether respondent came within the LHWCA exception for members of a crew of a vessel, the ALJ first considered whether to accord collateral estoppel effect to the district court's summary judgment ruling in the Jones Act proceeding that respondent was not a "seaman." The ALJ declined to do so, noting that the district court's ruling was interlocutory, in light of respondent's claim under 33 U.S.C.

[2] Although petitioner raised a question before the ALJ as to respondent's coverage under the LHWCA, it apparently paid respondent LHWCA benefits without a formal order from the time of his injury until the ALJ hearing. See Pet. App. 34a.

905(b), which was still awaiting resolution by the district court. Pet. App. 35a n.2. On the merits of the coverage issue, the ALJ concluded that respondent was covered by the LHWCA on the ground that he was a land-based employee without a permanent connection to a vessel, and therefore was not a "member of a crew" within the meaning of the LHWCA exclusion. *Id.* at 37a. After resolving other disputed issues, the ALJ awarded respondent benefits under the Act. *Id.* at 54a-55a. Because petitioner did not seek review of the compensation order, *id.* at 4a, that order became final 30 days after it was filed in the office of the deputy commissioner (now called district director, see 20 C.F.R. 701.301(a)(7)). 33 U.S.C. 921(a).

5. In the meantime, in August through September of 1992, the district court conducted a trial on respondent's claim against petitioner under 33 U.S.C. 905(b).[3] In December 1992, the district court ruled that respondent had not established negligence on the part of petitioner as operator of the tug, and it dismissed respondent's amended complaint. Pet. App. 28a-29a. Respondent appealed from that final order of the district court. *Id.* at 4a-5a.

[3] A few months before the trial, the district court entertained briefing on respondent's seaman status under the Jones Act, in light of the intervening decisions in *McDermott International, Inc.* v. *Wilander*, 498 U.S. 337 (1991), and *Southwest Marine, Inc.* v. *Gizoni*, 502 U.S. 81 (1991). The district court affirmed its earlier ruling that respondent was not a seaman, stating that respondent "did not have a 'more or less permanent connection' with the vessel on which he was injured nor did he perform substantial work on the vessel sufficient for seaman status." Pet. App. 27a (no citation for quotation in original).

6. The court of appeals reversed, holding that the district court improperly granted summary judgment on the Jones Act and unseaworthiness claims. Pet. App. 1a-19a. The court held that after this Court's decision in *Chandris, Inc.* v. *Latsis*, 115 S. Ct. 2172 (1995), the appropriate inquiry is not whether respondent had a permanent connection with a vessel, but whether respondent's "relationship with a vessel (or group of vessels) was substantial in terms of duration and nature, which requires consideration of the total circumstances of his employment." Pet. App. 7a. The court held that it may be necessary to examine the work performed by the employee while employed by different employers during the relevant time period. Such an examination was appropriate here, the court concluded, because a group of employers who join together to obtain a common labor pool from a union hiring hall is properly treated as a common employer; employees customarily performing work that would entitle them to seaman status should not, the court reasoned, be deprived of that status because the industry operates on a daily assignment system. *Id.* at 8a. Moreover, the court observed, respondent worked for petitioner on far more than one occasion and his work with petitioner alone may have provided a sufficient connection with petitioner's vessels to establish his status as a seaman. *Ibid.* In assessing respondent's status, therefore, the court ruled that all work performed by respondent as a deckhand must be considered, as well as work performed for other employers during the relevant time period. Accordingly, the court of appeals concluded that the district court had erred in granting summary judgment, "since issues of fact remained as to [respondent's] connection with the vessel." *Id.* at 9a.

The court of appeals also rejected petitioner's contention that the ALJ's award of LHWCA benefits to respondent precluded him from continuing to litigate his claim for Jones Act remedies. The court noted that, in *Southwest Marine, Inc.* v. *Gizoni*, 502 U.S. 81 (1991), this Court held that an employee who received payments voluntarily made by his employer under the LHWCA is not barred from prosecuting a Jones Act claim. Pet. App. 10a. While this case differs in that respondent received an adjudicated award of benefits, the court noted *Gizoni*'s emphasis that an employer will be credited for compensation previously paid, a factor that is equally applicable in the case of compensation paid pursuant to an adjudicated award. *Ibid.* (citing *Gizoni*, 502 U.S. at 91-92).

The court of appeals observed that the parties are on opposite sides of the seaman issue in the LHWCA adjudication as compared with their positions in the Jones Act suit. Pet. App. 11a. The court expressed concern about the "fairness in imposing * * * a bar [on independent resolution of the seaman question] where [the bar] could work [as] a disincentive on the part of the employer to vigorously litigate its defense in the LHWCA action." *Ibid.* The court also noted that a preclusion rule would subject to a Jones Act suit an employer who immediately and voluntarily begins compensation benefits, while immunizing from such a suit an employer who forces an employee to seek compensation through administrative adjudication. *Ibid.* The court concluded that, in those circumstances, a bar to relitigation "would not serve the purpose for which it is usually employed," and the court therefore extended the reasoning of *Gizoni* to its "next logical step" by holding that the LHWCA

determination by the ALJ did not bar respondent's Jones Act claim. *Id.* at 12a.

Judge Poole dissented on the question of whether respondent was a seaman. Pet. App. 13a-19a. He would have adopted the reasoning of the ALJ who decided respondent's LHWCA claim: that respondent's assignment to any particular vessel or fleet of vessels was "random, sporadic and transitory," and therefore lacking in the requisite connection to a vessel that would entitle him to seaman status. *Id.* at 18a (quoting *id.* at 37a).

SUMMARY OF ARGUMENT

I. Neither the doctrine of administrative collateral estoppel nor 33 U.S.C. 905(a)'s exclusivity provision precludes an independent determination in a Jones Act suit of whether the plaintiff is a "seaman," based on a prior determination of non-seaman status in an LHWCA proceeding. That conclusion is supported by the unique interplay between the two remedial schemes, the specific provision in the LHWCA to provide "credits" for recoveries under other remedial schemes, and the unfairness of applying estoppel and preclusion in this setting. If accepted, petitioner's position would force injured workers into an election of remedies, which Congress did not intend to impose in this remedial scheme. See, *e.g.*, *Southwest Marine, Inc.* v. *Gizoni*, 502 U.S. 81, 91-92 (1991).

II. The court below also properly determined that the jury should be given the opportunity to decide whether respondent was a "seaman" subject to Jones Act coverage under the test enunciated in *Chandris, Inc.* v. *Latsis*, 115 S. Ct. 2172, 2193-2194 (1995). That test consists of two elements: whether the worker "work[s] at sea in the service of the ship," *id.* at 2190;

and whether the worker's connection to the vessel is sufficiently substantial in duration and time to warrant Jones Act protection as a seaman, *ibid.* The test does not, as petitioner asserts (Br. 33), require "common ownership or control" of vessels as a prerequisite to establishing an identifiable "fleet" of vessels upon which a person may work. Rather, as in this case, employees hired through a union hiring hall may have a sufficiently substantial connection to an identifiable group of vessels to qualify for seaman status. Because reasonable persons might differ on that issue here, the jury should be permitted to evaluate the facts and determine whether respondent qualifies under the Jones Act as a seaman.

ARGUMENT

I. THE ADMINISTRATIVE LAW JUDGE'S AWARD OF BENEFITS TO RESPONDENT DOES NOT PRECLUDE THE DISTRICT COURT IN THIS JONES ACT SUIT FROM INDEPENDENTLY DETERMINING WHETHER RESPONDENT IS A "SEAMAN"

The court of appeals correctly held that respondent is not barred from establishing his status as a "seaman" in this suit under the Jones Act, 46 U.S.C. App. 688(a), by virtue of the determination by the administrative law judge (ALJ) in the proceeding under the Longshore and Harbor Workers' Compensation Act (LHWCA), 33 U.S.C. 901 *et seq.*, that respondent was not a "member of a crew," 33 U.S.C. 902(3)(G). Petitioner asserts that a contrary result is required by the "exclusivity" provision of Section 5(a) of the LHWCA, 33 U.S.C. 905(a), and the doctrine of administrative collateral estoppel. As petitioner acknowledges (Br. 19-20), its Section 5(a) argument is broader

than its collateral estoppel argument because the former would give preclusive effect to any formal award of benefits under the LHWCA, whether by adjudication or approved settlement, regardless of whether the coverage issue was actually litigated or expressly decided in the LHWCA proceeding. Petitioner's collateral estoppel argument would preclude Jones Act suits only when there has been actual litigation before the ALJ of the "member of a crew" issue. Pet. Br. 20. Both approaches purport to derive from the statutory language and purposes of the LHWCA. Because petitioner's broader preclusion argument rests on many of the same erroneous assumptions underlying its more limited collateral estoppel argument, we address estoppel first.

A. Respondent Is Not Collaterally Estopped From Asserting His "Seaman" Status Based On The ALJ's Ruling In The LHWCA Proceeding

Petitioner suggests (Pet. Br. 22) that the doctrine of administrative collateral estoppel should apply to bar consideration of the "seaman" status of the plaintiff in a Jones Act suit if the "formal award of LHWCA benefits (whether by an ALJ hearing or approval of a § 8(i) settlement)" results in LHWCA worker status being "expressly found." That contention lacks merit.

1. The principle of collateral estoppel generally applies to final determinations of an administrative body when it has acted in a judicial capacity and decided "issues of fact properly before it which the parties have had an adequate opportunity to litigate." *Astoria Fed. Sav. & Loan Ass'n* v. *Solimino*, 501 U.S. 104, 107 (1991). Because Congress is understood to legislate against a background of common law adjudicatory

principles, Congress is presumed to expect that such estoppel will apply unless a statutory purpose to the contrary is evident. *Id.* at 108. The presumption in favor of administrative collateral estoppel, however, is "lenient," *id.* at 112, applying only where Congress has failed "expressly or impliedly" to evince any intention on the issue, *id.* at 110. Moreover, the doctrine's "suitability may vary," according to various factors, including "the specific context of the rights at stake." *Ibid.*; see also Restatement (Second) of Judgments § 28(5)(c), at 273-274 (1982) (issue preclusion is inappropriate where the party to be precluded did not have an adequate incentive in the initial action to litigate vigorously his present position).

2. a. The specific context of the rights at stake in this case—the unique interplay between the LHWCA and the Jones Act—makes it highly unlikely that Congress intended a categorical rule that would give collateral estoppel effect to an administrative finding of LHWCA coverage, thereby foreclosing an independent determination by the jury in the Jones Act suit that the injured maritime worker was actually a Jones Act seaman.

This Court has established that the two statutes are mutually exclusive in the sense that a "member of a crew," as excluded from LHWCA coverage by 33 U.S.C. 902(3)(G), is synonymous with a "seaman," who is covered under the Jones Act, 46 U.S.C. App. 688(a). See *Chandris, Inc.* v. *Latsis*, 115 S. Ct. 2172, 2183-2184 (1995); *McDermott Int'l, Inc.* v. *Wilander*, 498 U.S. 337, 347 (1991). Notwithstanding that recognition of the mutual exclusivity of the two Acts, however, the line of demarcation between them is often unclear, and there is, "in a practical sense, a 'zone of uncertainty' inevitably connect[ing] the two Acts."

Simms v. *Valley Line Co.*, 709 F.2d 409, 411 (5th Cir. 1983) (quoting *McDermott, Inc.* v. *Boudreaux*, 679 F.2d 452, 459 (5th Cir. 1982)); see also *Chandris*, 115 S. Ct. at 2184. That confusion is compounded by the rule that "the LHWCA and its exclusionary provision do not apply to a harbor worker who [although within an enumerated LHWCA occupation] is *also* a 'member of a crew of any vessel,' a phrase that is a 'refinement' of the term 'seaman' in the Jones Act." *Southwest Marine, Inc.* v. *Gizoni*, 502 U.S. 81, 87 (1991) (quoting *Wilander*, 498 U.S. at 347) (emphasis added). Given the historical uncertainty between the two remedial schemes for maritime workers, it would be inappropriate to infer a congressional intent that a determination by an ALJ under the LHWCA must be given collateral estoppel effect in a Jones Act suit.

b. The text of the LHWCA supports the view that Congress did not intend for categorical rules of estoppel to apply in this context. Cf. *Astoria Federal*, 501 U.S. at 110 (administrative collateral estoppel inappropriate when the federal statute "carries an implication" against preclusion). As this Court pointed out in *Gizoni*, Section 3(e) of the LHWCA, 33 U.S.C. 903(e), demonstrates that "the LHWCA clearly does not comprehend such a preclusive effect." 502 U.S. at 91. Section 3(e) provides that any amounts paid to an employee "pursuant to * * * section 688 of title 46, Appendix (relating to recovery for injury to or death of seamen), shall be credited against any liability imposed" under the LHWCA. That provision of the LHWCA clearly contemplates that, notwithstanding the mutual exclusivity of the two schemes, an employer may have incurred concurrent liability under

the Jones Act and the LHWCA.[4] The credit provision of the LHWCA, and a similar credit doctrine developed under the Jones Act (see Pet. Br. 29), provide a practical solution to any problems of inconsistent adjudications: they in large measure eliminate double recovery by the employee. Moreover, those crediting arrangements underscore that the LHWCA does not give "primary jurisdiction" to the administrative scheme. See *Gizoni*, 502 U.S. at 90-91.

The collateral estoppel rule petitioner urges is further undermined by Section 22 of the LHWCA, 33 U.S.C. 922, which permits the deputy commissioner, "[u]pon his own initiative, or upon the application of any party in interest * * *, on the ground of a change in conditions or because of a mistake in a determination of fact," to issue a new order terminating, continuing, or modifying a compensation award, within one year of a denial of an award or within one year of the last payment of compensation if an award was made. This Court has held that the authority to reopen a decision under Section 22 is not limited to cases involving new evidence or changed circumstances, but rather vests broad discretion in the deputy commissioner to correct mistakes of fact, "whether demonstrated by wholly new evidence, cumulative evidence, or merely further reflection on the

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[4] Section 3(e) of the LHWCA, 33 U.S.C. 903 (e), states:

> Notwithstanding any other provision of law, any amounts paid to an employee for the same injury, disability, or death for which benefits are claimed under [the LHWCA] pursuant to any other workers' compensation law or [the Jones Act] (relating to recovery for injury to or death of seamen) shall be credited against any liability imposed by [the LHWCA].

evidence initially submitted." *O'Keefe* v. *Aerojet-General Shipyards, Inc.*, 404 U.S. 254, 255, 256 (1971) (per curiam); see also *Metropolitan Stevedore Co.* v. *Rambo*, 115 S. Ct. 2144, 2146 (1995). Administrative decisions awarding or denying compensation under the LHWCA therefore are not accorded the sort of finality under the LHWCA itself that could, in turn, furnish a basis for imposing issue preclusion outside that special statutory scheme—in tort suits in federal district court under the Jones Act.

c. Because of the uncertainties of coverage under the two remedial schemes, it is not at all surprising that employees routinely pursue concurrently both an LHWCA compensation claim and a Jones Act tort claim. Nor, given the existence of the credit doctrines' protection to the employer against an unfair double recovery by the worker, is it unfair that they do so. By permitting parallel proceedings, Congress can be presumed to have anticipated that claimants would be put in the position of arguing for crew-member status in the Jones Act proceeding and for non-crew-member status in the LHWCA proceeding, and that the employer could be expected to defend with inconsistent positions on coverage as well. Congress can also be presumed to have been aware that, because in each case the parties must weigh the likelihood of a potentially larger recovery under the Jones Act against the generally greater certainty of a smaller, no-fault compensation order under the LHWCA, both sides do not always have an incentive to litigate the coverage issue fully and with equal vigor.

The lack of incentive to litigate coverage as aggressively as possible is most likely to occur when the employer, although contesting LHWCA coverage,

would nonetheless actually prefer LHWCA liability to Jones Act liability; in that situation, the employee may well, by contrast, actually prefer the prospect of recovery under the Jones Act, rather than the LHWCA, even though he has filed a claim under the LHWCA. Neither party can be assumed to have a real incentive to litigate vigorously a position that is the reverse of that party's position in the Jones Act proceeding. Under widely recognized principles of issue preclusion, a party is not precluded from relitigating the same position it lost in a prior proceeding if the party's incentive to litigate vigorously that position in the initial action was inadequate. See Restatement (Second) of Judgments § 28(5)(c) (1982). *A fortiori*, a party should not be precluded from litigating a position where, as here, he did not espouse that position in the earlier proceeding. Indeed, the position that petitioner seeks to preclude respondent from advancing (*i.e.*, that respondent was a seaman) appears to have been merely suggested to the ALJ by petitioner, who of course is now arguing for the opposite result in the Jones Act suit. See Pet. App. 35a (noting that petitioner argued that "claimant may have been a Jones Act seaman").

This case thus vividly illustrates why the application of collateral estoppel principles in the Jones Act/LHWCA context would be problematic. Here, respondent filed his Jones Act suit first and was met with petitioner's defense that he was not a "seaman." The district court granted summary judgment in favor of petitioner on that issue, but the court of appeals denied respondent's petition for an interlocutory appeal. It was only at that point that respondent in fact filed an LHWCA claim. See Pet. App. 4a. At that point, it was to be expected that petitioner would

accede to LHWCA coverage, considering its position in the Jones Act proceeding and its payment of LHWCA benefits from the time of injury. Instead, it raised the coverage issue with the suggestion that respondent may not have been a covered employee under the LHWCA after all. If preclusive effect is accorded in the continuing Jones Act case to the ALJ's non-crew-member finding, petitioner will have effectively forced respondent to a disadvantageous election of remedies.[5] Thus, the court of appeals was correct to view adoption of a no-preclusion rule in those circumstances as merely "extending the reasoning of the *Gizoni* Court to the next logical step." Pet. App. 12a.[6]

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[5] The limitations period for the filing of an LHWCA claim is tolled during the pendency of a Jones Act suit that is unsuccessful because the plaintiff lacks seaman status. 33 U.S.C. 913(d). As a practical matter, however, it may be exceedingly difficult for an injured worker to refrain from filing an LHWCA claim, particularly where the employer's position in Jones Act litigation leads the worker to believe that he or she would receive benefits under the LHWCA. G. Gilmore & C. Black, *The Law of Admiralty* 435 (2d ed. 1975) (arguing against preclusion and asking: "How is an injured worker, who is arguably a Jones Act seaman, supposed to live and support his family during the months or years which will elapse before his damage recovery, if his Jones Act action is successful, becomes collectible?").

[6] In our *Gizoni* brief, we expressed the view, in support of the argument that acceptance of voluntary LHWCA payments does not preclude subsequent litigation of a Jones Act claim, that "[u]nder established principles of issue preclusion, only an adjudication under the LHWCA that an employee is not a crew member precludes litigation of a Jones Act claim." Brief for the United States as Amicus Curiae Supporting Respondent at 23 (No. 90-584) [filed May 15, 1991]. We indicated that such an adjudication must "satisf[y] the prerequisites for issue preclusion" to have that effect, without elaborating on what those prerequisites are or when they are deemed satisfied. *Id.* at 25. As explained above, we believe that each party's conflicting incentives in the LHWCA and Jones Act proceedings indicate that an important prerequisite for the application of issue preclusion—an adequate incentive to litigate—is absent, both in this case and more generally. For that reason, and in view of the offset and other features of the LHWCA and the other reasons set forth in the text, it is our more fully considered view that issue preclusion should not, as a general rule, be applied in this setting. Compare *Astoria Federal*, 501 U.S. at 114 (noting advantages of general rule of non-preclusion over case-by-case determination of adequacy of prior opportunity to litigate in administrative forum).

3. a. The election-of-remedies defect in petitioner's position is not limited to the sequence of events in this case alone. To apply collateral estoppel in this context would force injured workers as a general matter into an election of remedies that Congress did not intend. *Gizoni*, 502 U.S. at 92 n.5. If the first tribunal to determine the injured worker's status has preclusive effect on the other, as petitioner posits (Br. 8, 26), then the claimant must choose whether to pursue the more certain, but lower LHWCA benefits over the potentially far greater, but less certain Jones Act recovery. As this Court has recognized on numerous occasions, Congress did not intend in the LHWCA to force injured workers into an election of remedies. See, *e.g.*, *Gizoni*, 502 U.S. at 92 n.5; *Sun Ship, Inc.* v. *Pennsylvania*, 447 U.S. 715, 722 (1980).[7]

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[7] Congress expressed its disapproval of election of remedies in a similar context in 1959, when it deleted an LHWCA requirement that an injured worker make an election between compensation under the LHWCA and the right to bring an action against a third party (the right to bring such an action was automatically assigned to the employer if the compensation was paid under a formal award). See generally *Pallas Ship-*

b. In addition, as the court of appeals noted (Pet. App. 11a), according preclusive effect to an administrative adjudication under the LHWCA that a claimant was not a member of a crew would leave employers who immediately and voluntarily begin compensation payments subject to a Jones Act suit under this Court's ruling in *Gizoni*, while immunizing those who resist an employee's LHWCA claim and succeed in forcing adjudication of the issue. In order to ensure prompt payment of benefits to injured workers, the LHWCA imposes stringent penalties on an employer who fails to pay benefits to an injured worker without filing a notice stating the grounds upon which the employer contends the employee is not entitled to benefits. 33 U.S.C. 914(d) and (e). If petitioner prevails in this case, payment will frequently be delayed to an employee who is on the border between Jones Act and LHWCA coverage. An employer will have a strong incentive to controvert the employee's LHWCA claim, rather than pay voluntary benefits, even if it believes the injured worker to be entitled to such a remedy.

Creating such a disincentive to voluntary payment would impair a central purpose of the LHWCA, which is to foster prompt payment of compensation and medical benefits to injured workers. See 33 U.S.C. 914(a); H.R. Rep. No. 1767, 69th Cong., 2d Sess. 19-20 (1927). Such a ruling would also deny a worker injured in circumstances that might give rise to Jones

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ping Agency, Ltd. v. *Duris*, 461 U.S. 529, 537 (1983). Congress deleted that requirement when it became apparent that injured workers were often compelled, as a practical matter, to take compensation in order to meet their living expenses, and therefore to relinquish their third-party tort actions. *Ibid.*; *Bloomer* v. *Liberty Mutual Ins. Co.*, 445 U.S. 74, 80 (1980).

Act coverage the statutory right to a jury trial of the issue of whether he is, in fact, a seaman. Invoking collateral estoppel, and encouraging employers to controvert claims for the sole purpose of cutting off the claimant's possibly meritorious Jones Act litigation, thus introduces distortions into the system for compensating injured maritime workers and impedes the purposes of both statutes.

B. The LHWCA "Exclusivity Clause" Does Not Require That The ALJ Decision Be Treated As A Bar To Respondent's Jones Act Claim

We have argued above that Congress did not intend for LHWCA determinations to be given collateral estoppel effect in Jones Act suits. It follows that petitioner's broader argument—that *any* formal LHWCA award (whether litigated or not) precludes a Jones Act suit—must also fail. Nowhere in the LHWCA or the Jones Act has Congress provided for the determinations in proceedings under one Act to be given preclusive effect in proceedings under the other. Petitioner bases its argument for the preclusive effect of determinations in LHWCA proceedings on a provision which states that "[t]he liability * * * prescribed in section 904 of this title shall be exclusive and in place of all other liability of such employer to the employee * * * and anyone * * * entitled to recover damages from such employer at law or in admiralty on account of such injury," so long as the employer has complied with the Act's approved insurance requirement. 33 U.S.C. 905(a). Petitioner contends (Br. 19-20) that, by virtue of this "exclusivity" provision, a formal award of benefits under the LHWCA "per se preclude[s] further seaman remedies." That argument is based on a

fundamental misunderstanding of the function of the exclusivity provision.

1. The exclusivity of the LHWCA as the sole federal statute under which an employer may be held liable for compensating covered workers for their work-related injuries is not in question; rather, the issue is whether an inference should be drawn from that provision that a coverage determination in an LHWCA adjudication must be given preclusive effect. Section 5(a) of the LHWCA, 33 U.S.C. 905(a), establishes that if an injury or death is covered by the LHWCA, then the insured employer cannot be held liable for the injury or death under the Jones Act, general maritime law, or state common law, because the employer's liability under the LHWCA "shall be exclusive" of actions in tort, at law or in admiralty (except the rights preserved in Section 5(b) of the LHWCA, 33 U.S.C. 905(b)). Section 5(a) does not by its terms foreclose the basic coverage question from also being decided in the context of the issues raised in the non-LHWCA action. Thus, the insured employer may interpose an affirmative defense of coverage under the LHWCA as a predicate for dismissal of a tort action brought under a remedial scheme other than the LHWCA.[8] Cf. 2A A. Larson & L. Larson,

[8] The role of Section 5(a) is diminished in Jones Act suits because a plaintiff must establish his "seaman" status as part of his affirmative case, a showing that also affirmatively establishes that he is excluded from the LHWCA as a "member of a crew." Thus, because the exclusivity of the schemes is implemented by their coverage criteria, a Jones Act defendant has no need for an affirmative defense based on LHWCA coverage. That is not true, however, of an LHWCA employer who is a defendant in a common law tort or general maritime action brought by a putative LHWCA employee.

The Law of Workmens' Compensation § 65.12 (1996) (characterizing exclusivity clauses of workers' compensation statutes as creating affirmative defenses to tort actions). But Section 5(a) provides no textual support for petitioner's contention that a court entertaining the plaintiff's tort action may not independently determine whether the defendant is an "employer" subject to liability as "prescribed in section 904" of the LHWCA for the pertinent injury and, instead, must be bound by a prior determination on that question by an LHWCA adjudicator.[9]

2. Congress did not intend for the exclusivity of employer liability under the LHWCA to be absolute, as other LHWCA provisions make clear. The Act nullifies exclusivity when an employer fails to "secure the payment of compensation," that is, by failing to obtain insurance or to receive authorization from the Secretary to pay such compensation directly. See

[9] The LHWCA differs from the Federal Employees' Compensation Act (FECA), 5 U.S.C. 8101 *et seq.*, which not only contains an "exclusive remedy" provision, 5 U.S.C. 8116(c), but also provides that the action of the Secretary of Labor in allowing or denying payment under FECA is "final and conclusive for all purposes and with respect to all questions of law and fact," and shall not be subject to judicial review, see 5 U.S.C. 8128(b)(1) and (2). Accordingly, where there is a substantial question of FECA coverage, courts will stay or dismiss actions under the Federal Tort Claims Act, 28 U.S.C. 2671 *et seq.*, until the Department of Labor determines whether FECA applies. See, *e.g.*, *DiPippa* v. *United States*, 687 F.2d 14, 20 (3d Cir. 1982). The LHWCA, by contrast, contains no provision declaring the Secretary's decision awarding or denying LWHCA benefits "final and conclusive" for "all purposes" and with respect to "all questions of law or fact," and it provides for, rather than forecloses, judicial review. See 33 U.S.C. 921(c); *Gizoni*, 502 U.S. at 90-91.

33 U.S.C. 904, 932(a) and (b). In addition, the Act authorizes negligence actions by LHWCA-covered employees (except those employed to provide shipbuilding, repairing, or breaking services) against employers as owners and operators of a vessel. 33 U.S.C. 905(b). Given those explicit textual limitations on the scope of Section 5(a), it would be anomalous to construe it broadly to encompass preclusive effects not enumerated by Congress. The credit provision of Section 3(e), discussed at pp. 12-13, *supra*, further supports the conclusion that Section 5(a) should not be read expansively to preclude pursuit of other remedies. See also *Sun Ship*, 447 U.S. at 722 (declining to "construe § 905(a) to exclude remedies offered by other jurisdictions" and holding that claimants may in some circumstances obtain awards under both a state workers' compensation scheme and the LHWCA).

3. Petitioner's theory also runs directly counter to this Court's decision in *Gizoni*, which specifically rejected the argument that Section 5(a) precluded a claimant from bringing a Jones Act suit after having voluntarily received LHWCA benefits. 502 U.S. at 91-92 & n.5. Although the exclusivity provision implements the quid pro quo underlying workers' compensation schemes, in which the employer assumes liability without fault in exchange for relief from potentially larger damage verdicts, *Gizoni* makes clear that LHWCA "exclusivity" imposes no election of remedies on employees.

Petitioner acknowledges (Br. 16) *Gizoni*'s holding, but contends nonetheless that the Court's reasoning does not extend to a "formal award," even if that

award is based on a settlement of the claim.[10] Section 5(a), however, does not distinguish between payments made without an award and formal awards, or between settlements and adjudications; it speaks only in terms of an employer's "liability." 33 U.S.C. 905(a). Consequently, there is no textual support for petitioner's attempt to limit *Gizoni*'s holding that Section 5(a) does not mandate issue preclusion in a Jones Act suit.

Moreover, the reasons given by *Gizoni* for permitting a claimant to proceed notwithstanding his acceptance of voluntary payments undermine petitioner's broad theory of LHWCA exclusivity. *Gizoni* emphasized the ability to credit employers under the LHWCA for amounts previously paid. See 33 U.S.C. 903(e). That provision protects employers against having to pay twice under different remedial schemes for the same injury.[11] Although the Court noted that the question of coverage is not actually litigated when payments are made voluntarily, its re-

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[10] Settlements under the LHWCA must be approved by a district director of the Office of Workers' Compensation Programs (OWCP) or by an ALJ. See 33 U.S.C. 908(i)(1). Such an approved settlement is considered a formal award because it is embodied in a compensation order. See, *e.g.*, *Reid* v. *Universal Maritime Serv. Corp.*, 41 F.3d 200, 201 (4th Cir. 1994). There is no requirement that parties, when obtaining approval for the agreement, establish that the claimant is an "employee" within the meaning of Section 2(3) of the LHWCA, 33 U.S.C. 902(3). See 20 C.F.R. 702.242 (information necessary for a complete settlement application).

[11] In discussing this credit provision, the Court in *Gizoni* (502 U.S. at 91-92) also relied on G. Gilmore & C. Black, *The Law of Admiralty* 435 (2d ed. 1975), for the accepted view that "the compensation payments [made under the LHWCA] will be routinely deducted from [a] damage recovery" under the Jones Act.

liance on the credit provision as a statutorily recognized equitable counter-balance to the absence of an election-of-remedies requirement applies equally to a formal award under the LHWCA. See *ibid.* (emphasis added) ("amounts paid * * * shall be credited against *any liability* imposed by [the LHWCA]"). The Court also emphasized that the question of coverage is not actually litigated when payments are made voluntarily. That ground for inapplicability of exclusion principles also fully applies to virtually any settlement approved under Section 8(i) and to formal adjudications when the issue of whether the claimant meets the criteria for LHWCA coverage is not litigated. Thus, petitioner's broad interpretation of Section 5(a), under which a formal LHWCA award of any sort precludes a Jones Act action, is difficult to square with the reasoning of *Gizoni*. See *Figueroa* v. *Campbell Indus.*, 45 F.3d 311 (9th Cir. 1995) (declining, based on *Gizoni*, to accord preclusive effect to LHWCA compensation award embodying settlement); but see *Sharp* v. *Johnson Bros. Corp.*, 973 F.2d 423 (5th Cir. 1992), cert. denied, 508 U.S. 907 (1993).

II. RESPONDENT'S SEAMAN STATUS IS A MIXED QUESTION OF LAW AND FACT THAT SHOULD NOT BE KEPT FROM A JURY JUST BECAUSE PETITIONER EMPLOYED HIM ON A DAILY BASIS FROM A UNION HIRING HALL

The court below correctly decided that the district court should not have granted summary judgment on the issue of the employee's seaman status, and properly remanded for further proceedings. In defining the prerequisites for Jones Act coverage, this Court has, in its recent cases, "eschew[ed] the temptation to

create detailed tests to effectuate the congressional purpose" of distinguishing between sea-based and land-based maritime employees. *Chandris*, 115 S. Ct. at 2190. It has instead recognized that seaman status is a mixed question of law and fact in which "it is the court's duty to define the appropriate standard," but "[i]f reasonable persons, applying the proper legal standard, could differ as to whether the employee was a 'member of a crew,' it is a question for the jury." *Ibid.* (quoting *Wilander*, 498 U.S. at 356).

The proper legal standard has two parts: "First, * * * 'an employee's duties must "contribut[e] to the function of the vessel or to the accomplishment of its mission."' * * * Second, and most important for our purposes here, a seaman must have a connection to a vessel in navigation (or to an identifiable group of such vessels) that is substantial in terms of both its duration and its nature." *Chandris*, 115 S. Ct. at 2190 (citation omitted). The first requirement encompasses "'[a]ll who work at sea in the service of a ship' [and are therefore] *eligible* for seaman status." *Ibid.* (citation omitted). The second requirement aims fundamentally "to give full effect to the remedial scheme created by Congress and to separate the sea-based maritime employees who are entitled to Jones Act protection from the land-based workers who have only a transitory or sporadic connection to a vessel in navigation, and therefore whose employment does not regularly expose them to the perils of the sea." *Ibid.*

This case concerns the second of the foregoing requirements—whether respondent had the requisite connection to a vessel or "identifiable group of such vessels." In our view, "reasonable persons, applying the proper legal standard, could differ as to whether" respondent met that requirement, considering that he

had for some time worked on vessels in navigation as a deckhand or in ship maintenance (*e.g.*, painting) and, indeed, had performed considerable work for the same employer during the two months before the injury. *Chandris*, 115 S. Ct. at 2190 (citation omitted). This is not a case, for instance, in which the worker "ha[d] a clearly inadequate temporal connection to vessels in navigation," permitting the court to grant summary judgment for the employer. *Id.* at 2191; see *ibid.* ("A maritime worker who spends only a small fraction of his working time on board a vessel is fundamentally land-based and therefore not a member of the vessel's crew, regardless of what his duties are."). Rather, during "the period covered by [respondent's asserted] maritime employment," his connection to vessels was arguably "substantial in both duration and nature." *Ibid.*

The court of appeals held that, in applying that requirement, employers who join together to obtain a common labor pool through a union hiring hall may be considered a common employer. Pet. App. 8a. Hence, the vessels owned or operated by such employers and staffed through the union hiring hall could be an identifiable group of vessels for purposes of the seaman test. In our view, the court's pragmatic and reasonable approach properly takes into account the realities of the employment system in which respondent worked. Cf. *Imel* v. *Laborers Pension Trust Fund*, 904 F.2d 1327, 1333 (9th Cir.) (contractors who use union hiring hall are appropriately considered single "employing unit" for purposes of rights guaranteed to returning servicemembers by the Veterans Reemployment Rights Act), cert. denied, 498 U.S. 939 (1990); see generally D. Robertson, *The Law of Seaman Status Clarified*, 23 J. Mar. L. & Com. 1, 27

(1992) (suggesting that seaman status be gauged by the traditional dangers attendant to work on moving vessels and to facing the perils of the sea). Indeed, if such a pragmatic analysis is discarded, it would lead to the conclusion that petitioner operates its boats without *any* seamen, since it does not hire any "permanent" crew and relies instead on hiring hall referrals. See Pet. App. 3a.

Petitioner correctly observes (Br. 33-34) that some courts of appeals have required "common ownership or control" of vessels as a prerequisite of an "identifiable fleet." But see *Fisher* v. *Nichols*, 81 F.3d 319, 323 (2d Cir. 1996) ("We do not read *Chandris* as requiring that * * * a Jones Act plaintiff must necessarily have a substantial connection to a particular vessel owned by that employer or to a group of vessels under common ownership or control of that employer."). There is, however, no inherent reason to define the requisite connection of the maritime worker to an "identifiable group" of vessels in navigation—the so-called "fleet doctrine"—solely in terms of the property relationship between the vessels and their owner or owners. Cf. *Bertrand* v. *International Mooring & Marine, Inc.*, 700 F.2d 240, 245 (5th Cir. 1983) (common ownership or control not required where its absence is "determined by the employer, not the nature of the claimants' work"), cert. denied, 464 U.S. 1069 (1984).[12] In this case, the employee had for some time

[12] The ownership of a vessel is not always readily known or apparent. The possibility of joint ownership renders ownership a particularly poor proxy for determining the seaman status of an employee. For instance, if an employee works on two vessels, one owned by A + B, and the other owned by A + C, would that arrangement satisfy a common ownership test for purposes of Jones Act coverage? And, if so, would the employee

worked for an identifiable group of vessels; the fact that he was a casual worker, hired on a daily basis through a union hiring hall acting as an employment agency for a number of sea-based employers, should not be dispositive in determining whether he was a crew member entitled to Jones Act protection.

Employees who have been referred through a union hiring hall to work on a vessel are like their counterparts who may have been hired on a more permanent basis by a single employer, but who also commute daily to and from their work on vessels tied up in dock or return to port each night after plying the inland harbors or coastal waters; they fall somewhere in the middle of the "spectrum ranging from the blue-water seaman to the land-based longshoreman." *Chandris*, 115 S. Ct. at 2184 (citation omitted). Cf. *id.* at 2188 (describing *Gizoni* as holding that Jones Act may be available to ship repairman employed by shipyard who spends portion of time working on shore but rest of time at sea). Where reasonable persons might differ, the status of such a worker as a seaman should properly be decided by a jury based on its assessment of the substantiality of the claimant's connection with the group of vessels. See *id.* at 2190.

In any event, the cases upon which petitioner relies (Br. 34) do not expressly consider whether an identifiable group of vessels could be defined by a hiring hall employment system, such as the one utilized by petitioner. Moreover, petitioner incorrectly asserts (Br.

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lose seaman status if he or she then also works on a third vessel owned by B + C, or by B alone? Or, to give another example, if two vessels are both owned by A, does an employee who has worked on those vessels lose seaman status if A sells one of the vessels to B?

37) that the court of appeals' decision in this case allows consideration of a "claimant's work history with all his employers"; the court's reference to "work performed for other employers," Pet. App. 8a, in context, refers to employers making use of the union hiring hall.

For much the same reason, the lower court's ruling is entirely consistent with *Chandris*'s recognition that, "[w]hen a maritime worker's basic assignment changes, his seaman status may change as well." 115 S. Ct. at 2191. The court of appeals' analysis properly rejects the notion that, in the employment system in which respondent worked, each referral from the hiring hall must be considered a discrete assignment that interrupts the worker's tenure as a seaman. Rather, if the worker shows a consistent pattern of hiring hall referrals to seaman duties, a jury should have the discretion to conclude that the worker demonstrates a "regular and continuous, rather than intermittent, commitment of [his] labor to the function" of the vessels of participating employers. *Ibid.*

The court of appeals thus correctly remanded for further consideration of respondent's status as a seaman, rather than affirming the summary judgment in favor of petitioner on that issue. Because ownership status is not dispositive of "the ultimate inquiry [of] whether the worker in question is a member of the vessel's crew or simply a land-based employee who happens to be working on the vessel at a given time," *Chandris*, 115 S. Ct. at 2191, this Court should reject the proposition that employees on vessels who hire themselves out through hiring halls cannot, as a matter of law, be "member[s] of a crew," no matter the nature or duration of their work on one or more vessels or their exposure to the perils of the sea.

A rule foreclosing coverage in such circumstances would frustrate the purposes of the Jones Act because it would permit employers to structure their assignment practices so that their vessels have no "permanent" crew, and therefore no seamen. That sort of evasion of Jones Act coverage through "arrangements with third parties regarding the vessel's operation or * * * the manner in which work is assigned," *Bertrand*, 700 F.2d at 245, should not be permitted. Accordingly, the Court should not add a "common ownership or control" requirement to the two-part test for seaman status that it recently articulated in *Chandris*.[13]

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[13] The court below alternatively held that the employee's work for petitioner alone—which it described as "far more than a single occasion," "a dozen occasions over the two and a half month period," and "a substantial period of time"—"may in itself provide a sufficient connection" to permit a finding of seaman status. Pet. App. 8a & n.3. We agree that the facts of this case warrant submission of that issue of respondent's status to the jury as well. Thus, the court of appeals' decision should be affirmed even if this Court were to conclude that only evidence pertaining to respondent's work on petitioner's vessels should be considered.

CONCLUSION

The decision of the court of appeals should be affirmed.

Respectfully submitted.

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